No. 97-1252

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, Attorney General, et al.,
Petitioners,

vs.

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

KENT S. SCHEIDEGGER*
CHRISTINE M. MURPHY
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

*Attorney of Record

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QUESTION PRESENTED

Whether, in light of the Illegal Immigration Reform and Immigrant Responsibility Act, the courts below had jurisdiction to entertain respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society.

Society has a strong interest in being free from the threat of terrorism. The present case will affect the government's ability to rapidly and effectively deport persons supporting terrorist organizations. Delay in the deportation of these individuals is

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

In 1987, the Immigration and Naturalization Service ("INS") began proceedings to deport eight alien members of the Popular Front for the Liberation of Palestine ("PFLP"). *American-Arab Anti-Discrimination Committee* v. *Reno*, 119 F. 3d 1367, 1370 (CA9 1997) ("*American-Arab II*"). The government contended that the "PFLP is an international terrorist and communist organization." *Ibid.* The organization, which has proclaimed the United States one of its enemies, has engaged in terrorist activity that has resulted in the deaths of at least 26 individuals, 17 of whom were United States citizens. See Pet. for Cert. 2. The FBI had uncovered evidence that the eight aliens were engaged in fundraising activities for the PFLP. See Pet. for Cert. 3. Based on this information, the initial deportation charges were drafted by the INS. Pet. for Cert. 3-4.

The INS originally charged the aliens with routine status violations under 8 U. S. C. §§ 1251(a)(2) and 1251(a)(9) and for one violation based on the group's fund-raising activities, a violation of 8 U. S. C. § 1251(a)(6). *American-Arab Anti-Discrimination Committee* v. *Thornburgh*, 970 F. 2d 501, 504 (CA9 1991). Administrative remedies for the status violations proceeded through the steps of the Immigration and Nationality Act's ("INA") statutory review scheme. See *id.*, at 505, n. 2. The section 1251(a)(6) charge, on the other hand, became the basis for a challenge in federal district court by the American-Arab Anti-Discrimination Committee and the eight aliens. *American-Arab II*, *supra*, 119 F. 3d, at 1370. The original complaint filed in the district court claimed "that section 1251(a)(6)(D) violated the first and fifth Amendments, that the government engaged in selective prosecution in violation of the first and fifth Amendments, and that the INS procedures could not provide them with a fair and impartial hearing." *American-Arab Anti-Discrimination Committee* v. *Thornburgh*, *supra*, 970 F. 2d, at 505. The plaintiffs' claimed "that the INS had singled them out for selective enforcement of the immigration laws based on the impermissible motive of retaliation for constitutionally protected associational activity." *American-Arab Anti-Discrimination Committee* v. *Reno*, 70 F. 3d 1045, 1054 (CA9 1995) ("*American-Arab I*").

The section 1251(a)(6) charges were subsequently dropped. However, additional charges were alleged against Hamide and Shehadeh, the two permanent resident aliens. Pet. for Cert. 4. The INS "brought new charges against them under 8 U. S. C. § 1251(a)(6)(f)(iii), alleging that they were deportable as members of an organization that advocates or teaches the unlawful destruction of property. Later, the INS added a charge under 8 U. S. C. § 1251(a)(6)(f)(ii), alleging that Hamide and Shehadeh were associated with a group that advocates the unlawful assaulting or killing of government officers." *American-Arab I*, 70 F. 3d, at 1253.

The District Court eventually issued a preliminary injunction enjoining the INS from conducting proceedings against the six aliens charged with routine status violations. See *American-Arab I*, 70 F. 3d, at 1054.. The District Court, finding it lacked jurisdiction over Hamide and Shehadeh's claims, granted summary judgment to the government as to those claims. Pet. for Cert. 5. The Court of Appeals in *American-Arab I*, however, decided that the federal courts had jurisdiction to review Hamide and Shehadeh's selective enforcement claims. *American-Arab I*, 70 F. 3d, at 1071. The District Court then stayed the proceeding against Hamide and Shehadeh and upheld the injunction of the proceedings against the other six plaintiffs. *American-Arab II*, 119 F. 3d, at 1370; see Pet. for Cert. 5-8 (detailed description of these federal court decisions).

The government appealed the "district court's decision refusing to dissolve the existing preliminary injunction and granting the injunction in favor of Hamide and Shehadeh." *American-Arab II*, 119 F. 3d, at 1370. While the appeal was

pending, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") was enacted. Pet. for Cert. 9. The government then filed motions to dismiss based on the fact that 8 U. S. C. § 1252(g) as enacted by the IIRIRA deprives the federal court of jurisdiction over the aliens' claims. *American-Arab II*, 119 F. 3d, at 1371.

The Court of Appeals in *American-Arab II* agreed with the government that section 1252(g) applies retroactively but concluded that the section does not eliminate federal court jurisdiction over the plaintiffs' claims. *Id.*, at 1372. The Court of Appeals concluded that application of section 1252(g) would raise " 'serious constitutional question[s] . . . if [it] were construed to deny any judicial forum for a colorable constitutional claim.' " *Ibid.* (quoting *Webster* v. *Doe*, 486 U. S. 592, 603 (1988)) (internal quotation marks and citations omitted). To correct this perceived denial of meaningful judicial review, the court construed section 1252(f) to preserve the federal court's jurisdiction and held that it was "incorporated" in the retroactive subdivision (g). *Id.*, at 1373. The Court of Appeals also reaffirmed its holding in *American-Arab I* that "*prompt* judicial review of the Plaintiffs' claims was required because violation of Plaintiffs' First Amendment interests would amount to irreparable injury that 'cannot be vindicated by post-deprivation remedies.' " *Id.*, at 1374 (quoting, with original emphasis, *American-Arab I*, *supra*, 70 F. 3d, at 1057).

The Court of Appeals then affirmed the District Court's decision to issue the preliminary injunction to Hamide and Shehadeh and to affirm the injunction issued to the other six aliens. Pet. for Cert. 10. The court also denied the government's request for rehearing en banc. Pet. for Cert. 11. The government then sought a writ of certiorari from this Court. Certiorari was granted on June 1, 1998, limited to the jurisdictional question.

SUMMARY OF ARGUMENT

The Court of Appeals' interpretation of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") is contrary to the clear intent of Congress to consolidate all litigation of deportation into the statutory review procedure of 8 U. S. C. § 1252. The Court of Appeals read 8 U. S. C. § 1252(b)(4)(A) and its predecessor, 8 U. S. C. former § 1105a(a)(4), in isolation to preclude transfer under 28 U. S. C. § 2347(b)(3) to the district court. These provisions should not be read in isolation.

Considering the section as a whole and the principle of *INS* v. *Chadha*, 462 U. S. 919 (1983), *amicus* submits that the requirement that the petition be decided only on the administrative record should be limited to those claims which the alien could present to the agency. Under this understanding, 28 U. S. C. § 2347(b) remains available and permits meaningful review of all claims. Congress intended that review of the final order be the complete and exclusive remedy. *Amicus*' interpretation of the IIRIRA will allow this intent to be realized.

ARGUMENT

I. The underlying claims are cognizable on review of the final order of deportation under both prior and current law.

A. Overview.

The Immigration and Nationality Act ("INA") establishes the procedures for the deportation of aliens in this country. See generally 8 U. S. C. § 1101 *et seq*. The Act also constructed a comprehensive administrative and judicial review scheme for the review of deportation proceedings.

> "In general, removal determinations are initially made by immigration judges, and are appealable to the BIA [Board of Immigration Appeals]. The BIA, in turn, renders the final administrative decision with regard to all matters

relating to removal proceedings, including eligibility for relief from removal, detention, and parole and bond determinations." A. Fragomen & S. Bell, Immigration Fundamentals—A Guide to Law and Practice, ch. 8.1, p. 8-1 (4th ed. 1997).

Upon completion of this administrative review process, the Act then permits review of the final order of deportation in the court of appeals. 8 U. S. C. former § 1105a; § 1252.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") has recently amended the INA. The IIRIRA, which was enacted as part of the Omnibus Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009-575, repeals the prior judicial review statute, 8 U. S. C. § 1105a, and replaces it with 8 U. S. C. § 1252. Subdivision (g) of the new section 1252 explicitly limits the jurisdiction of the federal courts. The Court of Appeals believed that application of this provision according to its plain meaning would prevent the plaintiffs in the present case from receiving meaningful review of their selective enforcement claims. Properly understood, however, the INA's administrative and judicial review scheme, both before and after the amendments, provides for complete review of all claims upon the issuance of the final order of deportation.

B. Effective Date.

Part of the Court of Appeals' interpretive difficulty stemmed from the differing effective dates of the subdivisions of 8 U. S. C. § 1252. See *American-Arab Anti-Discrimination Committee* v. *Reno*, 119 F. 3d 1367, 1372 (CA9 1997) ("*American-Arab II*"). Subdivision (g) of that section, titled "Exclusive jurisdiction," provides:

> "Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."

Congress instructed that the subsection should apply immediately. Section 306(c)(1) of the IIRIRA states that:

> "subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection(a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act." Pub. L. No. 104-302, 110 Stat. 3009-612.

The rest of the act, however, does not apply until April 1, 1997, see Pub. L. No. 104-208, § 309(a), 110 Stat. 3009-625 (1997),[2] and cases pending on the effective date are "grandfathered." See *infra*, at 8.

If the term "this section" in subdivision (g) was applied literally, and if the effective date provisions are applied as written, illogical results would follow. If the remedies in subdivisions (a) through (f) of section 1252 are the only remedies, but those subdivisions do not apply to cases pending when IIRIRA was enacted, then there would be no judicial review for those cases. The Court of Appeals chose to break the second horn of this dilemma, disregarding the plain language of Congress' effective date mandate, and "incorporating" other subdivisions of section 1252 into the "retroactive" subdivision (g). There is a simpler solution that does less violence to the statutory language: break the first horn of the dilemma. *Amicus* submits that the term "this section" in subdivision (g) should be understood to refer to whichever judicial review section governs the proceeding in question, whether it be present section 1252 or its predecessor, former section 1105a.

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2. Section 309(a): IN GENERAL. —Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the enactment of the Act (in this title referred to as the "title III-A effective date").

The present case is a "transitional case." Section 309(c)(1) of the IIRIRA provides:

> " . . . in the case of an alien who is in exclusion or deportation proceedings as of the title III-A effective date—
>
> "(A) the amendments made by this subtitle shall not apply, and
>
> "(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments."[3]

Deportation proceedings were begun against the plaintiffs in January 1987. *American-Arab II*, *supra*, 119 F. 3d, at 1370. Soon after, the plaintiffs filed in the district court a federal action contesting "the deportation proceeding on First Amendment grounds." *Ibid.* Since that time, the First Amendment claim and the appropriateness of the various courts' jurisdiction have been extensively litigated. See *American-Arab Anti-Discrimination Committee* v. *Reno*, 70 F. 3d 1045, 1066 (CA9 1995) ("*American-Arab I*"). Technically, then, the deportation proceedings are still pending. This case is governed by 8 U. S. C. former § 1105a, as modified by IIRIRA §309(c)(4). As discussed further in part II, *infra*, 8 U. S. C. § 1252(g) makes those review procedures exclusive.

C. Cognizable Claims.

The aliens' ability to litigate their claims on review of the final order of deportation follows from the principles in *INS* v. *Chadha*, 462 U. S. 919 (1983). In that case, Chadha's constitutional challenge to the congressional veto was beyond the administrative agency's authority. Hearings had been conducted and an immigration judge had suspended Chadha's deportation. *Id.*, at 923-924. A report of the suspension was forwarded to Congress, as it had the power to veto the determination under section 244(c)(2) of the INA. *Id.*, at 924-925. Congress ultimately vetoed the suspension, and the immigration judge reopened the deportation proceedings. *Id.*, at 928. Chadha challenged the constitutionality of section 244(c)(2). *Ibid.* However, the immigration judge ruled that he had no authority to reach this question. *Ibid.* On appeal to the Board of Immigration Appeals ("BIA"), Chadha again challenged section 244(c)(2). Like the immigration judge in the prior proceeding, the BIA also held it was without authority to rule on the constitutionality of an act of Congress. *Ibid.*

3. Paragraphs (2), (3), and (4) provide the Attorney General with options to apply the new act and for modifications to the old section.

Pursuant to 8 U. S. C. former § 1105a(a), Chadha sought review in the Court of Appeals, where his constitutional challenge was resolved. *Chadha*, 462 U. S., at 928. Both Houses of Congress appearing as *amicus curiae* challenged the Court of Appeals' jurisdiction over Chadha's claim. *Id.*, at 937. *Amicus* claimed that "the one-House veto authorized by § 244(c)(2) takes place outside of the administrative proceedings," and therefore is not encompassed in section 1105a's grant of jurisdiction. *Ibid.* Although past authority could be interpreted as requiring a direct attack on the deportation order, the Court did not accept this argument. *Id.*, at 937-938. The Court recognized that "Chadha's deportation stands or falls on the validity of the challenged veto." *Id.*, at 938. The Court then concluded that a final order of deportation " 'includes *all matters* on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing.' " *Id.*, at 937 (emphasis added).

Resolution of the *American-Arab* plaintiffs' selective enforcement claim will determine whether the plaintiffs can be removed from the United States. Like Chadha's claim, plaintiffs' deportation "stands or falls" on the validity of the claim. The final order of deportation is thus contingent on the resolution of the challenge and, accordingly, is encompassed in both section 1252 and former section 1105a's judicial review schemes.

The majority of claims affecting an order of deportation can be resolved in the administrative review process under former section 1105a or section 1252. However, as this Court has counseled, "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures . . . ." *Califano* v. *Sanders*, 430 U. S. 99, 109 (1977). Under *Chadha*, the Court of Appeals, on review of the deportation order, has jurisdiction over all matters that effect the validity of the final order of deportation, regardless of whether the BIA could or did consider them.

Both former section 1105a and section 1252 incorporate the procedures of chapter 158 of title 28. In that chapter, 28 U. S. C. § 2347 establishes a mechanism for review of claims not addressed during the administrative review process. Section 2347(b) provides:

> "When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—
>
> "(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;
>
> "(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or
>
> "(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented."

The section requires the Court of Appeals to first determine "whether a hearing is required by law." 28 U. S. C. § 2347(b). This determination directs where the court will remand the case for additional factfinding. When an agency has failed to

properly develop the record for an issue that it is required to hear, the court can remand the case to the agency for correction of this error. § 2347(b)(1). When an agency is not required to conduct a hearing and "a genuine issue of material fact" is raised, the Court of Appeals can then turn to the district court for additional factfinding. § 2347(b)(3). To implement the *Chadha* principle, this section must be understood as applying separately to the various claims. That is, when the agency cannot consider a constitutional attack, an administrative hearing is not "required by law" as to that claim and district court factfinding is appropriate.

"An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien." 8 U. S. C. § 1229a(a)(1). These proceedings will normally focus on the violations charged. In the present case, the majority of the violations that have been charged are routine status violations. 8 U. S. C. §§ 1251(a)(2) and 1251(a)(9). For example, the plaintiffs have been charged with violations of 8 U. S. C. § 1251(a)(2) for overstaying their visas. *American-Arab I*, *supra*, 70 F. 3d, at 1053. The hearing that is required to be conducted for the resolution of this claim will focus on the visa and evidence that the individuals overstayed its length. If the proceedings before the immigration judge and the appeal to the BIA fail to develop a record sufficient to establish the validity of the visa violations, then the Court of Appeals would be required to remand the case to the BIA for further development of these facts.

However, because *INS* v. *Chadha* has developed such a broad definition of review of final orders, some questions will be beyond the agency's authority. For example, the proceedings for the six aliens charged with status violations will focus on the actual violations as it is these charges that decide if the aliens are deportable. Finding the facts underlying the selective enforcement claim, however, is not necessary for the resolution of these violations, and therefore, the agency is not required by law to hold a hearing to find these facts. It is this situation that section 2347(b)(3) anticipated. -If the administrative review

process has failed to develop "a genuine issue of material fact" that affects the final order of deportation, the district court can then conduct additional factfinding.

The Court of Appeals rejected the argument that transfer to the district court was available. It believed that 8 U. S. C. § 1252(b)(4)(A) and its predecessor, 8 U. S. C. former § 1105a(a)(4), precluded such a transfer. The new section provides that the Court of Appeals "shall decide the petition only on the administrative record . . . " with exceptions not applicable here, and the former section is substantially the same.

To be sure, both the former and present provisions, read in isolation, would seem to have the meaning the Court of Appeals gives them. Yet these provisions must be read in light of the section as a whole and the *Chadha* principle. Congress unambiguously required "all questions of law and fact" to be litigated "in judicial review of a final order under" section 1252. 8 U. S. C. § 1252(b)(9). Congress thought exclusivity of the remedy was so important that it made subsection (g) alone applicable to pending cases. IIRIRA §306(c)(1). When combined with the presumption that all claims must be reviewable at some point, see *infra*, at 18, these provisions indicate strongly that all claims against deportation should be cognizable on review of the final order.

In light of these considerations, the requirement that the petition be decided only on the administrative record should be understood as limited to those claims which the alien could present to the agency. For other claims, section 2347(b) remains available. This interpretation is reinforced by 8 U. S. C. § 1252(a)(1), which specifically forbids use of subdivision (c) of section 2347. If Congress had intended to forbid invocation of both subdivisions (b) and (c), it would have been simple enough to say so. The omission of (b) while forbidding (c) implies that (b) remains available.

Congress intended that review of the final order be the complete and exclusive remedy. The interpretation of section 1252 that *amicus* proposes, while admittedly a bit of a stretch,

does far less violence to the overall statutory language than the Court of Appeals' contortion.

II. Review of the final order of deportation is the exclusive remedy.

A. Statute's Language and Structure.

For cases commencing after April 1, 1997, the exclusivity of the statutory remedy is explicit:

> "**(9) Consolidation of Issues for Judicial Review.**—Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section." 8 U. S. C. § 1252(b)(9).

While other sections of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") may be less than exemplars of draftsmanship, this one is crystal clear. It is difficult to see how Congress could have stated exclusivity more clearly. A construction of the IIRIRA to provide other channels of review when review of a final order is available,[4] as the Ninth Circuit construed subsection (f) in the present case, *American-Arab Anti-Discrimination Committee* v. *Reno*, 119 F. 3d 1367, 1372 (CA9 1997) ("*American-Arab II*"), would be contrary to the unmistakable language of subsection (b)(9).

Review of the final order as the exclusive remedy comports with Congress' intent to streamline the deportation process by

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4. The question of availability of habeas corpus when review of the final order is precluded by section 1252(a)(2), see, *e.g.*, *Jean-Baptiste* v. *Reno*, No. 97-6062 (CA2 May 8, 1998), is not presented by the present case and need not be considered.

precluding initial judicial review[5] and provides for meaningful review of all claims. Sections 1105a and 1252 were enacted to preclude initial judicial review and to allow for the completion of the INA's administrative review process. To reach this objective, Congress limited the judicial system's jurisdiction to review of final deportation orders only. Section 1252(g) was enacted to reinforce this preclusion of jurisdiction.

Thunder Basin Coal Co. v. *Reich*, 510 U. S. 200, 207 (1994) illustrates the appropriate analysis to review statutory schemes that limit initial judicial review. In *Thunder Basin*, this Court was asked to analyze the Mines Act's judicial review scheme. *Id.*, at 206. The Mines Act gave the Secretary of Labor the authority to enforce compliance with the Act's provisions through civil penalties and other sanctions. *Id.*, at 204. Individuals could challenge the Secretary's enforcement of the Act by seeking review with the Mine Safety and Health Commission ("MSHC"). *Ibid.* In addition, 30 U. S. C. § 816(a)(1) of the act granted exclusive jurisdiction to the Court of Appeals to review challenges to MSHC decisions. *Id.*, at 208.

The *Thunder Basin* petitioner, however, sidestepped the administrative scheme and made a preemptive strike. Before the Secretary of Labor even attempted to enforce sanctions for Thunder Basin's violation of 30 CFR § 40.4, the petitioners filed suit in the federal District Court to prevent the enforcement. *Id.*, at 204-205. The petitioner's employees, pursuant to the requirements of section 813(f) of the Mine Act, had appointed two employees of the United Mine Workers of America Union, who were not employees of the mine, to serve as their representatives. *Ibid.* Thunder Basin claimed that the designation of these non-employee union representatives violated the principles of collective-bargaining representation

5. "Initial judicial review" refers to review conducted before the administrative remedies are exhausted.

under the National Labor Relations Act. *Id.*, at 205. Thunder Basin alleged that requiring it to make the challenge

> "through the statutory-review process would violate the Due Process Clause of the Fifth Amendment, since the company would be forced to choose between violating the Act and incurring possible escalating daily penalties, or, on the other hand, complying with the designations and suffering irreparable harm." *Ibid.* (footnote omitted).

The Court of Appeals for the Tenth Circuit concluded that the district court lacked jurisdiction over the petitioner's claims, and this Court agreed. *Id.*, at 205, 218.

Although the presumption normally favors constructions that allow judicial review of administrative proceedings, 1 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 2.11, p. 132, n. 23 (2d ed. 1992), this presumption was overcome in *Thunder Basin* because Congress' intent to preclude initial judicial review was " 'fairly discernible in the statutory scheme.' " *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 351 (1984) (quoting *Data Processing Service* v. *Camp*, 397 U. S. 150, 157 (1970)); see *Thunder Basin*, *supra*, 510 U. S., at 207.

The Court instructed that

> "[w]hether a statute is intended to preclude initial judicial review [should be] determined from the statute's language, structure, and purpose, its legislative history, *Block*, 467 U. S., at 345, and whether the claims can be afforded meaningful review. See, *e.g.*, *Board of Governors of Federal Reserve System* v. *MCorp Financial, Inc.*, 502 U. S. 32 (1991); *Whitney Bank* v. *New Orleans Bank*, 379 U. S. 411 (1965)." *Thunder Basin*, 510 U. S., at 207.

Under this analysis, Congress' intent to limit judicial review to final orders of deportation only is apparent.

The INA's statutory scheme as a whole supports the conclusion that Congress intended to preclude initial judicial review. See *Block*, *supra*, 467 U. S., at 349. Congress has set

up a system of administrative and judicial review that is comprehensive. See generally 8 U. S. C. former § 1105a; § 1252. The system provides mechanisms for review of all claims insuring that judicial review will not be completely denied, see, *e.g.*, 28 U. S. C. § 2347(b)(3), and explicitly designates the appropriate courts for such review. Development of such a comprehensive administrative and judicial review scheme suggests that Congress intended to limit review to final orders of deportation. If sections 1105a and 1252's procedures are not applied to the *American-Arab* petitioners' claim, this comprehensive system has no real authority over the efficient resolution of immigration matters.

B. Purpose and History.

Congress' intent to preclude initial judicial review can also be "inferred . . . from the collective import of legislative and judicial history behind a particular statute." *Block*, *supra*, 467 U. S., at 349. When Congress enacted 8 U. S. C. § 1105a in 1961, it intended to limit judicial review to final orders of deportation. Soon after section 1105a was enacted, this Court had occasion to interpret the provision and address the purpose behind the new legislation. *Foti* v. *Immigration and Naturalization Service*, 375 U. S. 217 (1963). The Court explained that the

> "fundamental purpose behind section 106(a) [codified as 8 U. S. C. § 1105a] was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts." *Id.*, at 224.

To prevent attorneys from exploiting the judicial review process and delaying the enforcement of the INA deportation provision, Congress eliminated "the previous initial step in obtaining judicial review—a suit in a District Court— . . . ." and limited review to the statute's provisions. *Id.*, at 225.

Since 1961, the INA has been modified a number of times. A. Fragomen & S. Bell, Immigration Fundamentals—A Guide to Law and Practice, ch. 1.3, p. 1-5 (4th ed. 1997) (listing amendments to the INA). The goal behind each amendment to the INA has always been to develop "an immigration policy that is both *fair* and *effective* . . . ." S. Rep. No. 249, 104th Cong., 2d. Sess., 7 (1996) (emphasis added); see also S. Rep. No. 48, 104th Cong., 1st Sess., 1, 3 (1995) (describing how the immigration system is in disarray and needs to be simplified as applied to criminal aliens in order to be effective); Fragomen & Bell, *supra*, at 1-6 (explaining that the Immigration Reform and Control Act of 1986 stemmed from an attempt by Congress to "regain control of its border while upholding the traditional American standards of fairness and compassion . . .").

Of particular concern recently has been insuring the enforcement of the INA's provisions. S. Rep. No. 249, at 7. A report on the Immigration Control and Financial Responsibility Act of 1996 explained:

> "Some Americans appear to be ambivalent about the enforcement of the Immigration and Nationality Act. This includes a number of judges, perhaps reflecting a tension they feel between their duty to apply the law and their inclination to be humane toward those seeking a better life in this country . . . ." *Ibid.*

To correct this ambivalence and to achieve a fair and effective procedure for deportation matters, the judiciary committee realized that Congress needed to be explicit regarding its objectives. *Ibid.* Congress could not have been more explicit with its retroactive application of section 1252(g): "Except as provided in this section and *notwithstanding any other provision of law, no court shall have jurisdiction* . . . ." 8 U. S. C. § 1252(g) (emphasis added).

C. Meaningful Review.

In *McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479, 496 (1991), the Court reiterated that the presumption is that Congress intended to allow for meaningful judicial review of administrative proceedings. If review of the final order did not provide meaningful review, there would be a presumption against its exclusivity. Recognizing that this Court would avoid statutory interpretation that results in "the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims," *id.*, at 497, Congress left 28 U. S. C. § 2347(b)(3) untouched, while it prohibited factfinding pursuant to 28 U. S. C. § 2347(c). See 8 U. S. C. § 1252(a).

As explained in 8 C. Gordon, S. Mailman & S. Yale-Loehr, Immigration Law and Procedure § 104.13[3][a], page 104-177 (rev. ed. 1998) when discussing the IIRIRA revisions, "alternative bases of jurisdiction typically exist . . . . [and] it is mistaken to assume that a particular provision of the IIRIRA or the AEDPA terminates all access to the courts simply because a new statute eliminates the traditional route." "Our whole constitutional history shows that Congress generally doesn't intend to violate constitutional rights, and a court ought not readily assume any sudden departure." Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1399 (1953). By leaving section 2347(b)(3) untouched, Congress demonstrated its concern that all meaningful review not be terminated. Congress has ensured the constitutionality of its limitation of jurisdiction to review of final orders of deportations.

Even though the doctrine of exhaustion of administrative remedies delays application of section 2347(b)(3), the petitioners will receive adequate and meaningful review of their claims. The remedy provided by the court of appeals' post-administrative review combined with section 2347(b)(3)'s additional factfinding when necessary, is an adequate and effective means "to test the validity of the order." See 8 U. S. C. § 1252(d); 8 U. S. C. former § 1105a(c). This Court has found judicial

review schemes that similarly delay review until exhaustion of administrative remedies to be adequate and effective. *Board of Governors of Federal Reserve System* v. *MCorp Financial, Inc.*, 502 U. S. 32, 43-44 (1991).

In *Board of Governors*, this Court reviewed "the judicial review provisions of the Financial Institutions Supervisory Act of 1966." *Id.*, at 36. The act gave the Board of Governors of the Federal Reserve System ("Board") "substantial regulatory power over bank holding companies and establishe[d] a comprehensive scheme of judicial review of Board actions . . . ." *Id.*, at 37. The specific provision at issue in the litigation was 12 U. S. C. § 1818(i)(1) which "precluded judicial review of many Board actions . . . ." *Board of Governors*, 502 U. S., at 42. MCorp claimed that notwithstanding the statutes' explicit preclusions of jurisdiction, the district court had jurisdiction to issue an injunction pursuant to specific sections of the bankruptcy code and the judicial code. *Id.*, at 39.

This Court held that section 1818(i)(1) precluded such injunctions. *Id.*, at 42-44. The Court primarily relied on the fact that "FISA expressly provides MCorp with a meaningful and adequate opportunity for judicial review . . . ." *Id.*, at 43. MCorp was challenging the "validity of the source of strength regulation." *Ibid.* The Court concluded that this regulation could be reviewed in the Court of Appeals *after* the Board concluded that MCorp had violated the regulation. *Id.*, at 43-44. Although finishing the Board proceedings would delay MCorp's judicial review, the Court concluded the review was adequate.

In the present case, we are faced with a procedurally similar challenge. The aliens subjected to deportation proceedings "have filed a federal suit challenging deportation proceedings on First Amendment grounds before a final order of deportation has been issued." *American-Arab II*, *supra*, 119 F. 3d, at 1369. Because the immigration statutes require exhaustion of administrative remedies before the Court of Appeals obtains jurisdiction, see 8 U. S. C. former § 1105a(c); § 1252(d), the aliens'

challenge will be delayed until a final order of deportation is issued. Individuals, often with greater rights at stake than in the present case, have their access to federal courts delayed while their administrative or judicial proceedings are completed. For example, state prisoners are typically kept in prison awaiting completion of their state criminal trials and appeals before they seek federal habeas corpus relief, yet this exhaustion is required. 28 U. S. C. § 2254(b)(1). As in *Board of Governors*, this delay does not diminish their ability to obtain meaningful review of their claims.

"A person against whom a deportation proceeding is brought may feel that the proceeding is unjustified and illegal but generally has no right to go to court immediately to stop the proceeding." Gordon, Mailman & Yale-Loehr, *supra*, § 104.02[2], at 104-22. A petitioner will generally only be allowed to forego exhaustion of judicial or administrative remedies if "irreparable injury" would result from the delay. See, *e.g.*, *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 612 (1975).

In *American-Arab Anti-Discrimination Committee* v. *Reno*, 70 F. 3d 1045 (CA9 1995) ("*American-Arab I*"), the Court of Appeal "held that *prompt* judicial review of the Plaintiffs' claims was required because violation of Plaintiffs' First Amendment interests would amount to irreparable injury that 'cannot be vindicated by post-deprivation remedies.' " *American-Arab II*, *supra*, 119 F. 3d, at 1374 (quoting, with original emphasis, *American-Arab I*, at 1057). As has been demonstrated, the post-deprivation review provided by former section 1105a and section 1252, along with the factfinding procedures of 28 U. S. C. § 2347(b)(3), are adequate to resolve the plaintiff's selective enforcement claims. Furthermore, "[t]he mere fact that the litigant is subjected to the burden of undergoing the administrative hearing process does not in itself demonstrate the irreparable harm that would justify injunctive relief." Gordon, Mailman & Yale-Loehr, *supra*, § 104.02[2], at 104-24.

American-Arab I claimed "that the perpetual threat of deportation based on group affiliation constitute[d] the kind of irreparable injury" that required federal district court intervention. *American-Arab I*, *supra*, 70 F. 3d, at 1058. Yet issuance of a preliminary injunction would not relieve this threat. A preliminary injunction, even when affirmed on appeal, is not res judicata. See 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4009, p. 157 (2d ed. 1996). Even a permanent injunction can be lifted if the precedent on which it is based is no longer good law. See *Agostini* v. *Felton*, 138 L. Ed. 2d 391, 409, 117 S. Ct. 1997, 2006 (1997). The preliminary injunction issued in this case, therefore, does not eliminate the threat of deportation. The possibility that the plaintiffs will eventually lose on the merits, and hence the threat of deportation, remains to this day.[6]

The uncertainty can only be resolved by a final judgment in this action or a final order of deportation. The original complaint was filed on April 3, 1987. *American-Arab Anti-Discrimination Committee* v. *Thornburgh*, 970 F. 2d 501, 505 (CA9 1991). The present case has been litigated for over ten years and still has not prevented this "irreparable injury" the Court of Appeals claims needs federal court intervention. Had the courts stayed on course, the process would have been much simpler: two administrative hearings, a court of appeal review and, if necessary, additional factfinding in the district court. See *supra*, at 5-13. Indeed, the plaintiffs' selective enforcement claims would likely have been resolved by now. The uncer-

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6. As noted earlier, plaintiffs support an organization that has declared the United States its enemy and murdered American citizens. See *supra*, at 2. Their "disparate impact" evidence consisted of a showing that people supporting opponents of the now-defunct Communist regimes in Afghanistan and Nicaragua, which were Cold War enemies of the United States, were not deported. *American-Arab II*, 119 F. 3d, at 1375-1376. By holding that this made a case, the District Court held, in effect, that the Constitution requires the United States, in the conduct of its foreign affairs, to treat its enemies equally with its allies. Any rational person would conclude that the possibility of this decision eventually being reversed is substantial.

tainty which is supposedly injuring First Amendment rights has been extended, not eliminated, by the Ninth Circuit's failure to adhere to the INA's provisions.

"Congress' intent in adopting and then amending the INA was to expedite both the initiation and the completion of the judicial review process." *Stone* v. *INS*, 514 U. S. 386, 400 (1995). The doctrine of exhaustion of administrative remedies' "underlying aim is to prevent harassing interruptions of the administrative process and to avoid unnecessary or repetitious court reviews." Gordon, Mailman & Yale-Loehr, *supra*, § 104.02[2], at 104-26. In the present case, if the doctrine had been followed we would have avoided a decade-long debate over court jurisdiction, and the plaintiffs would have received both meaningful and timely review of their claims. Instead, the final resolution of the selective enforcement claim is still delayed. Since "in a deportation proceeding . . . as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States," *INS* v. *Doherty*, 502 U. S. 314, 323 (1992), this may not cause the plaintiffs lasting injury.

However, "frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." *McKart* v. *United States*, 395 U. S. 185, 195 (1969). Congress recognized this principle when it reaffirmed the appropriate limits on federal courts' jurisdiction. See discussion of 8 U. S. C. § 1252(g), *supra*, at 17. It is now time for this Court to allow the INA's administrative and judicial review to proceed as designed.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed and the case remanded with directions to dismiss for lack of subject-matter jurisdiction.

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Respectfully submitted,

KENT S. SCHEIDEGGER*
CHRISTINE M. MURPHY

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

*Attorney of Record